

THOMAS LESLIE REDLEAF
v.
MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-25-A

Decided April 30, 1990

Appeal from a disapproval of an assignment of Osage headright income.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Constitutional Law:
Generally

The Board of Indian Appeals does not have authority to declare an act of Congress unconstitutional.

APPEARANCES: Dean Daniel, Esq., Pawhuska, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Thomas Leslie Redleaf seeks review of an October 5, 1989, decision of the Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), affirming the disapproval of an assignment of Osage headright income. For the reasons discussed below, the Board dismisses this appeal.

Background

Edna ElReno Schwenker, who has Cherokee-Ponca Indian blood, owns a .815075 interest in an Osage headright. 1/ By a document dated June 29, 1988, she purported to assign her headright income to appellant, who is her brother. 2/ The assignment was submitted to the Superintendent,

1/ The term "Osage headright" is commonly used to describe an individual right to share in the income from the Osage tribal mineral estate, and sometimes in other tribal income as well. See, e.g., Act of Oct. 21, 1978, 92 Stat. 1660; Globe Indemnity Co. v. Bruce, 81 F.2d 143 (10th Cir. 1935), cert. denied, 297 U.S. 716 (1936); Estate of Vivian M. Rogers v. Acting Muskogee Area Director, 14 IBIA 217 (1986).

2/ The document provides in part:

"I Edna ElReno Schwenker * * * do hereby give, bargain, sell, transfer, assign and set over unto my brother * * * for his use and enjoyment during

Osage Agency, BIA, for approval. The Superintendent disapproved it on June 5, 1989, holding that, because Schwenker possessed Indian blood, she was prohibited by Federal law from assigning her headright income.

The Superintendent stated:

The assignment of an Osage headright interest was first authorized by the Act of April 12, 1924, 43 Stat. 94, which provides, in pertinent part, as follows:

[A]ny right to or interest in . . . mineral interests . . . of any person not an Indian by blood, may with the approval of the Secretary of the Interior and not otherwise be sold, assigned and transferred

The question whether an Osage headright interest owned by a non-Osage Indian could be alienated was considered in Taylor v. Jones, 51 F.2d 892, 893 (10th Cir 1931)[, cert. denied, 284 U.S. 663 (1931)]. The court said:

[W]hen Congress passed the Act of April 12, 1924 (43 Stat. 94), providing for the alienation of headrights, it did not extend that authority to all outside the Tribe, but limited the authority to those "not an Indian by blood." The bankrupt is an Indian by blood; Congress has the same power over her and her property as it has over an Osage; doubtless the same considerations of public policy that prompted Congress to withhold from Osages the right to alienate these headrights prevailed as to Indians of other tribes.

Although the 1924 Act has been amended by the Acts of October 21, 1978, § 8(a), 92 Stat. 1660, and October 30, 1984, § 2(f), 98 Stat. 3165, these amendments do not authorize a non-Osage Indian to alienate his Osage headright interest.

(Superintendent's Decision at 2).

fn. 2 (continued)

his lifetime all of my right, title and interest in and to all income accruing to and otherwise payable by reason of my ownership of a .815075 Osage Indian Headright Interest * * * . This Assignment of Income is not made for purpose of creating any collateral security interest for any loan but is an outright assignment, not subject to redemption or rescission. * * * This Assignment of Income shall not be construed as an Assignment of Ownership of the Osage Indian Headright Interest and such Assignment of Income is expressly conditioned upon the written consent to same by the Osage Agency and the acceptance of such assignment by my brother * * *."

Appellant appealed the disapproval to the Area Director, contending in toto:

1. That the Act of April 12, 1924, 43 Stat. 94, as amended by Acts of October 21, 1978, Section 8(a), 92 Stat. 1660, and October 30, 1984, Section 2(f), 98 Stat. 3165 prohibiting a person of Indian blood from assigning their headright interest is unconstitutional.

2. That to allow a person not Indian by blood to assign their interest and to deny a person of Indian blood from assigning their interest is discriminatory as to persons of Indian blood.

(Appellant's Statement of Reasons at 1).

On October 5, 1989, the Area Director affirmed the Superintendent's disapproval of the assignment, agreeing with the Superintendent that the assignment was prohibited by Federal law. The Area Director also noted that he was without authority to declare Federal statutes unconstitutional.

Appellant's appeal from this decision was received by the Board on November 13, 1989. Appellant stated that he did not intend to file a brief.

Discussion and Conclusions

The only contentions appellant has made in this matter are those he made before the Area Director, *i.e.*, that the Federal statutes concerning Osage headrights are unconstitutional and discriminatory insofar as they prohibit a person of Indian blood from assigning his/her Osage headright income.

[1] The Board has stated on several occasions that it lacks authority to declare an act of Congress unconstitutional. *E.g.*, Estate of Shonie Curley, 17 IBIA 115 (1989); Florida Tribe of Eastern Creek Indians v. Assistant Secretary--Indian Affairs (Operations), 13 IBIA 269 (1985); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983). Because it appears that this is the only relief sought by appellant, 3/ and because the Board is without jurisdiction to grant this relief, this appeal must be dismissed.

3/ Appellant does not challenge the Area Director's interpretation of Federal law. The Board notes that the Area Director's interpretation appears to be well established. *See Taylor v. Jones, supra*; Taylor v. Tayrien, 51 F.2d 884 (10th Cir.), *cert. denied*, 284 U.S. 672 (1931); Solicitor's Opinion M-34857, 2 Op. Sol. on Indian Affairs 1437 (Feb. 13, 1947).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge